170

(2)

No. 09-1442

Supreme Court, U.S.
FILED
SEP - 9 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENALI, L.L.C. and AMERICAN BUSH, INC.,

Petitioners,

v.

UTAH STATE TAX COMMISSION and PAM HENDRICKSON, R. BRUCE JOHNSON, D'ARCY DIXON PIGNANELLI, and MARC B. JOHNSON, in their official capacities as members of the Utah State Tax Commission,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Utah

BRIEF IN OPPOSITION

MARK L. SHURTLEFF
Utah Attorney General
NANCY L. KEMP*
Assistant Utah Attorney General
Attorneys for Respondents
160 East 300 South, 5th Floor
P.O. Box 140858
Salt Lake City, Utah 84114-0858
(801) 366-0533
nkemp@utah.gov

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

The Utah Supreme Court determined that Utah's tax on sexually explicit businesses "is constitutional as a content-neutral regulation of conduct that satisfies the *O'Brien* incidental burdens test." Pet. App. 43. While petitioners purport to ask whether the tax is, in fact, content-based, the body of the petition does not attack the basis of the court's content-neutrality determination. Instead, it proceeds, without analysis, from the premise that the tax is content-based. Consequently, the question before this Court is:

Is a grant of certiorari warranted where petitioner has not challenged the actual basis for the Utah Supreme Court's decision that the Utah tax on sexually explicit businesses is constitutional under the First Amendment?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. There is No Split of Authority on Content-Neutral Taxation of Businesses Where Nude or Semi-Nude Individuals Provide Services 3

II. The Utah Court Did Not Err in Applying *O'Brien*'s "Incidental Burdens" Test 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

American Bush v. City of S. Salt Lake, 2006 UT 40, 140 P.3d 1235 2

Bushco v. Utah State Tax Comm'n, 2009 UT 73, 225 P.3d 153 1

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 4, 9, 10, 11, 12

Heideman v. S. Salt Lake City, 165 Fed. Appx. 627, 2006 WL 245160 (10th Cir. 2006) 2

Pooh Bah Enters. v. County of Cook, 232 Ill.2d 463, 328 Ill. Dec. 892, 905 N.E.2d 781, *cert. denied*, 130 S. Ct. 258 (2009) 4, 5, 6, 7

United States v. O'Brien, 391 U.S. 367 (1968) ..... *passim*

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. I 1, 8, 12

U.S. Const. amend. XIV 1

Nev. Rev. Stat. § 368A.200 (West, Westlaw through the 2009 75th Regular Session of the Nevada State Legislature and technical corrections received from the Legislative Counsel Bureau (2009)) 7

Utah Code Ann. § 59-27-102 (West 2008) 6

Utah Code Ann. § 59-27-105 1

INTRODUCTION

Respondents, the Utah State Tax Commission and tax commissioners, file this brief in opposition to the Petition for a Writ of Certiorari to review the decision of the Utah Supreme Court in *Bushco v. Utah State Tax Commission*, 2009 UT 73, 225 P.3d 153. That opinion affirmed the unreported 2007 Final Judgment and Order of the Utah Third District Court. Both are reprinted in Petitioner's Appendix ("Pet. App.").

STATEMENT OF THE CASE

In 2004, the Utah legislature enacted a statute implementing a tax to address problems caused by the commission of sex offenses and the high rate of recidivism among sex offenders. *See* Pet. App. 2, ¶ 1. The proceeds of the tax are directed to a special revenue fund. After deducting the cost of administering the tax (not to exceed 1.5 percent of the fund), 85 percent of the fund is designated for sex offender treatment and 15 percent for investigation and prosecution of individuals who use the Internet to victimize children. Utah Code Ann. § 59-27-105; Pet. App. 69-71. The statute is reprinted in relevant part at Pet. App. 65-72.

Before the tax became effective, certain entertainment businesses featuring semi-nude dancing brought suit to enjoin its enforcement, claiming infringement of their First and Fourteenth Amendment rights.

After the third amended complaint was filed, Denali, L.L.C. and American Bush, Inc., the present petitioners, were permitted to appear as plaintiffs/intervenors. Denali operates an entertainment business licensed by Salt Lake City under its sexually oriented business ordinance and features nude dancing. American Bush operates a semi-nude dancing venue in South Salt Lake City and, under a city ordinance passed in 2001, must comply with a minimal dress code; its compliance exempts it from the tax. The South Salt Lake City ordinance has been upheld against both state and federal constitutional challenges in *American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235, and *Heideman v. South Salt Lake City*, 165 Fed. Appx. 627, 2006 WL 245160 (10th Cir. 2006).

The state district court ruled that the tax is content-neutral "because it falls on any business involving nudity in its services." Pet. App. 59. Because the statute's provisions "impact expressive conduct such as nude dancing[,]" *id.*, the district court applied the four-factor test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded that each factor of the test was met. On appeal, the Utah Supreme Court agreed that the tax is content-neutral because it is triggered solely by conduct and was not enacted with the predominant purpose of suppressing protected expression. Like the district court, the supreme court applied *O'Brien* and concluded that the tax met all four factors. Pet. App. 19-37. In addition, the supreme court held that the tax is

not unconstitutionally overbroad because it does not prohibit a substantial amount of protected expression.[1] Pet. App. 37-40.

REASONS FOR DENYING THE PETITION

I. There is No Split of Authority on Content-Neutral Taxation of Businesses Where Nude or Semi-Nude Individuals Provide Services

The basis of the Utah Supreme Court's decision is that the tax is content-neutral and must therefore be evaluated under *O'Brien*'s four-part test. The court was careful to distinguish between "the *O'Brien* test for a regulation of conduct that imposes incidental burdens on some protected expression and the test for a regulation of speech that targets secondary effects." Pet. App. 20. As the court observed, "they are two distinct tests directed at two different inquiries." *Id.* The court rejected the secondary effects analysis because it implicates regulations that are "directed at *speech* rather than conduct, but [are] justified with reference to the secondary effects associated with the speech rather than the communicative content of the speech itself." *Id.* at 21. The Utah tax, by contrast,

[1] The supreme court did, however, overturn the tax as applied to escort services on vagueness grounds because "[n]owhere does the statute define an escort in terms of nudity." Pet. App. 42, ¶ 56. The Tax Commission's petition for rehearing on that issue was denied.

"is triggered by nudity, which the Supreme Court has specifically declared 'is not an inherently expressive condition.'" *Id.* at 12 (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)). Finding the tax "indistinguishable from the public nudity ordinance upheld in *Erie*[,]" the court further noted that "[a]lso like the *Erie* ordinance, the Tax applies or does not apply without reference to either protected expression or any particular message." *Id.* at 13.

While petitioners initially purport to challenge the court's conclusion that the tax is content-neutral, Pet. at i, the petition does not examine the court's analysis, but builds its argument on the presupposition that the statute is content-based – a premise the Utah court rejected. Petitioners then attempt to show a split of authority by citing cases and proposed legislation addressing content-based schemes. Petitioners' citations are inapposite to establishing a split of authority on the constitutionality of content-neutral statutes that may incidentally burden protected expression.

Petitioners' reliance on a list of legislative proposals to tax sexually oriented businesses – taken verbatim from the petition for writ of certiorari filed in *Pooh Bah Enterprises v. County of Cook*, 2009 WL 2187815 at *22 n.10, *cert. denied*, 130 S. Ct. 258 (2009) – is misplaced. *See* Petition at 14 n.2. Petitioners have made no effort to show that the cited proposals contain language similar to the Utah statute. Nor is there a showing that any of the proposals has been enacted into law or subject to judicial scrutiny.

These inchoate legislative efforts do nothing to establish a split of authority. Moreover, to the extent that they represent a variety of approaches to addressing problems related to such businesses, permitting lower courts to review the constitutionality of enacted legislation before intervention by this Court promotes the development of the law and thorough consideration of all constitutional ramifications. Short-circuiting this process leaves the Court with a less-informed basis for decisionmaking.

Petitioners' failure to recognize the court's distinction between content-based statutes and the content-neutral provision at issue here is further reflected in the petition's unattributed use, without significant alteration, of an argument from the recent, unsuccessful certiorari petition in *Pooh Bah*. *Compare* 2009 WL 2187815 at *22-24, *with* Petition at 14-16. The argument is inapposite to the present case because it addresses only "content-based tax schemes." Petition at 14; 2009 WL 2187815 at *22. The city and county taxes at issue in *Pooh Bah* were unquestionably content-based, involving a combined 11-percent tax on "'amusements[,]'" including "'performances conducted at adult entertainment cabarets'" but explicitly exempting live performances "'in any of the disciplines which are commonly regarded as part of the fine arts, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings.'" *Pooh Bah Enters. v. County of Cook*, 232 Ill.2d 463, 467-68, 328 Ill. Dec. 892, 896-97, 905 N.E.2d 781, 785-86 (2009)

(quoting Cook County Amusement Tax Ordinance § 2 (1999); Chicago Municipal Code § 4-156-010 (2008)). The county's zoning ordinance defined "adult entertainment cabaret" in terms of content, as establishments featuring "'topless dancers, strippers, male or female impersonators or other entertainers who[,]'" while displaying "'"'specified anatomical areas[,]' B. [p]erform in a manner which is designed primarily to appeal to the prurient interest of a patron or person; or C. [e]ngage in, or engage in simulation of, 'specified sexual activities.'"" 905 N.E.2d at 786 (quoting Cook County Zoning Ordinance of 2001, art. 14.2.1 (2006)). The city ordinance contained similar definitions. *Id.*

In contrast, nothing in the language of the Utah statute differentiates between services performed by nude or partially nude individuals in fine arts venues and those performed in adult entertainment venues. Nor does the statute distinguish nudity targeting patrons' prurient interests or simulating sexual activities from nudity expressing other values. The Utah tax applies, by its own terms, to any "business at which any nude or partially denuded individual, regardless of whether the nude or partially denuded individual is an employee of the sexually explicit business or an independent contractor, performs any" compensated service on the business premises during at least 30 days within a calendar year. Utah Code Ann. § 59-27-102(4) (West 2008), Pet. App. 66.

The argument of amicus curiae Association of Club Executives, Inc. (ACE) is equally unavailing. ACE urges the Court to grant certiorari in order to

establish the unconstitutionality of the Nevada Live Entertainment Tax. Like the tax in *Pooh Bah Enterprises* – but unlike the Utah tax – the Nevada Live Entertainment Tax is content-based. While broadly defining "live entertainment," the Nevada statute provides a number of categorical exemptions from the tax, including entertainment in small venues; at trade shows; at boxing events; by wandering musicians; in common areas of shopping malls; at food demonstrations or craft shows; at retail grocery, hardware, or houseware outlets; at outdoor concerts; at minor league baseball games; and at NASCAR events. *See* Nev. Rev. Stat. 368A.200, Amicus App. 30-32; *see also* Amicus Brief at 8-10. No such categorical exemptions appear in the Utah tax. Moreover, as ACE points out, "even the *amount* of the tax is not consistently assessed" under the Nevada statute. Amicus Brief at 10. The Utah tax, by contrast, applies consistently across all venues. Finally, the Nevada tax raises an issue that is entirely absent from the Utah statute: it contains a prohibition on any legal action against the state to prevent or enjoin collection of the tax, a provision it notes as common practice in state tax statutes. *See* Amicus Brief at 11. A grant of certiorari in this case will provide no opportunity for the Court to reach that issue.

Because both petitioners and amicus fail to grasp the distinction between content-based and content-neutral statutes, their arguments rely on showing error in the application of a "secondary effects" rationale. *See* Petition at 12-19; Amicus Brief at 20-26.

These arguments are fruitless because the Utah court did not decide the case based on the secondary effects doctrine. Consequently, there is no merit to amicus's contention that the Utah decision "will establish a dangerous precedent that will be used across the country to radically expand the secondary effects doctrine far beyond the current constitutional restraints and parameters set by this Court, permitting the unbridled enactment of virtually any tax on protected expression." Amicus Brief at 26. No decision of this Court is needed to correct a rationale the Utah court did not employ.

II. The Utah Court Did Not Err in Applying *O'Brien*'s "Incidental Burdens" Test

For the same reason that the petition does not show a split of authority – an incorrect presupposition that the statute is content-based – it fails to demonstrate an erroneous application of *O'Brien*'s "incidental burdens" test. At no point does the petition address the language of Utah's statute. Given petitioners' presupposition that the statute is content-based, it is unsurprising that the petition makes no reference to the statutory language, as nothing in the statute refers in any way to content. *See* Pet. App. 65-72. Scrutiny of the statute reveals that the tax is applied only on the basis of services performed in a state of nudity or partial nudity. Because "[b]eing 'in a state of nudity' is not an inherently expressive condition" entitled to First Amendment protection, the statute, contrary to petitioners' representations,

is not content-based, as the Utah court correctly determined. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

The actual basis for the Utah court's decision is sound under this Court's precedents. As the Utah court correctly recognized, because the statute is content-neutral, it must be evaluated under *O'Brien*'s four-part test: (1) whether the tax is within the Utah legislature's power to enact; (2) whether it furthers a substantial state interest; (3) whether that interest is unrelated to the suppression of protected expression; and (4) whether it is narrowly tailored to serve the state interest. The court found each factor of the test satisfied. Rather than taking issue with the court's analysis, petitioners conflate the *O'Brien* and secondary effects analyses, declaring that "[t]he link between the regulation and 'secondary effects' in the *Renton* line of cases is exactly the same as the link that is required under *O'Brien*." Petition at 23. In support of this approach, they cite to Part III of the *Erie* opinion, which they erroneously identify as written by Justice O'Connor "for the majority (on this point)." *Id.* at 24. In fact, Part III was written for a four-justice plurality. Moreover, the plurality opinion did not, as petitioners claim, fail to differentiate between the two tests. Recognizing that "the doctrinal theories behind 'incidental burdens' and 'secondary effects' are, of course, not identical," 529 U.S. at 295, the plurality concluded that

> there is nothing objectionable about a city passing a general ordinance to ban public

> nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity – nude erotic dancing – is particularly problematic because it produces harmful secondary effects.

Id. Far from conflating the analyses as petitioners have done, the *Erie* plurality discerned that even if the city considered nude dancing to be "a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing." *Id.* at 296. Applying *O'Brien*, the plurality upheld the Erie ordinance as a content-neutral provision placing only an incidental burden on protected expression: "The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*." *Id.* at 301. *Erie* provides no support for petitioners' position.

While petitioners claim that the intermediate scrutiny of *O'Brien* requires a showing of "some clear relationship between this tax and *proven harms*; and that the measure deals with such harms to a *material degree*[,]" Petition at 22, they provide no supporting authority for such requirements. The Utah court concluded those arguments "are misplaced because they are based on the requirements of the secondary

effects test rather than the *O'Brien* test." Pet. App. 24, ¶ 32. The court pointed to the distinction made by the plurality in *Erie* between content-based and content-neutral restrictions and the greater latitude permissible in restricting expressive conduct where that conduct is not targeted. *See* Pet. App. 25 at ¶ 32 n.53. Nothing in petitioners' argument acknowledges this distinction, much less shows error in the Utah court's application of it.

Moreover, to the extent that a link is required between the State's conceded need to fund sex offender therapy and the means chosen to accomplish that interest, *O'Brien*'s "narrow tailoring" prong provides it. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (alteration in original). Here, the State's interest in funding sex offender therapy would be less effectively achieved without the money derived from the tax.

Petitioners provide no basis for distinguishing the Utah statute from the ordinance upheld under *O'Brien* in *Erie*. They concede that "the State has the power to tax and raise revenue." Petition at 21. They also concede that "[t]he need for therapy for those who have been convicted of sexual offenses is not in controversy." *Id.* Because the statute is content-neutral, as discussed in Point I, above, it "also satisfies *O'Brien*'s third factor, that the government

interest is unrelated to the suppression of free expression." *Erie*, 529 U.S. at 301. Avoiding liability under the statute, as under the Erie ordinance, necessitates only compliance with minimal dress requirements. And even if, as in *Erie*, those requirements may not be as effective as other means of addressing any problems associated with a specific occurrence of public nudity, the State, like the City of Erie, "must balance its efforts to address the problem with the requirement that the restriction be no greater than necessary to further" its interest. *Id.* Finally, as in *Erie*, "the restriction leaves ample capacity to convey the dancer's erotic message." *Id.* The Utah court properly applied *O'Brien* and *Erie* in concluding that the Utah statute passes First Amendment scrutiny, and petitioners have failed to cast its ruling in doubt.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General
NANCY L. KEMP*
Assistant Utah Attorney General
Attorneys for Respondents

**Counsel of Record*

September 2010